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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HOLOCARD, a California general partnership,
Petitioner,

vs.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, WESTERN ELECTRIC CO., INC., GENERAL TELEPHONE & ELECTRONICS CORPORATION, GENERAL TELEPHONE COMPANY OF CALIFORNIA, SECURITY PACIFIC NATIONAL BANK and WELLS FARGO BANK,
Respondents.

Supreme Court No. 84-

Ninth Circuit No. 83-2467

DISTRICT COURT C-79-0182 EFL

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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60 pp

TO: THE HONORABLE WARREN F. BURGER, The Chief Justice, and Associate Justices of the Supreme Court of the United States:

HOLOCARD, a California general partnership, the petitioner herein, ("HOLOCARD"), prays that a Writ of Certiorari issue to review the Memorandum Decision of the United States Court of Appeals for the Ninth Circuit, (the "Ninth Circuit") entered in this matter on December 20, 1984. The matters required by *Rule* 21 of the *Supreme Court Rules* are as follows:

(a) *Questions Presented*

Whether HOLOCARD was unjustly deprived of a trial on the merits of its anti-trust complaint, where HOLOCARD's evidence in the District Court directly controverted respondents' claims that they acted to bar it from access to telephone facilities needed to implement its credit card verification system for legitimate business reasons and, thus, under existing precedents of this Court raised triable issues of fact as to conspiracy and violations of *Sections* 1 and 2 of the *Sherman Act*? If so, whether the District Court's denial of HOLOCARD's Motions to Reconsider (the "Motions to Reconsider") under *Federal Rules of Civil Procedure ("FRCP") Rules* 59/60 was a deprivation of due process? In any event, whether in the face of proof of incompetence and gross and inexcusable misconduct by HOLOCARD's former counsel (in failing to conduct promised discovery and to prepare legally adequate opposition to Respondents' Summary Judgment Motions which prevented HOLOCARD from having its deserved day-in-Court), the District Court's denial of HOLOCARD's Motion to be relieved from the Summary Judgments was a deprivation of due process requiring intervention by this Court?

(b) *List of Parties*

HOLOCARD is the petitioner and plaintiff in this matter. AMERICAN TELEPHONE & TELEGRAPH COMPANY ("AT&T"), THE PACIFIC TELEPHONE & TELEGRAPH COMPANY ("PACIFIC"), WESTERN ELECTRIC COMPANY ("WESTERN") (collectively the "BELL respondents"); GENERAL TELEPHONE & ELECTRONICS CORPORATION ("GTE") and GENERAL TELEPHONE COMPANY OF CALIFORNIA ("GTC") (GTE and GTC collectively called the "GTE respondents") (the BELL respondents

and the GTE respondents collectively called the "respondents") are respondents and defendants in this matter.

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(d) *Reports of Opinions*

The Memorandum Of Decision by the United States District Court for the Northern District of California, the Honorable EUGENE F. LYNCH (the "Trial Judge") awarding Summary Judgment to the respondents is dated June 14, 1983. This Memorandum is set forth in the Appendix hereto. HOLOCARD's Motions to Reconsider were denied without formal opinion. The Order thereon is also in the Appendix. The Memorandum of Decision issued by the Ninth Circuit (the "Ninth Circuit"), dated December 20, 1984, affirmed the Judgment below, and made the following findings:

> "In this case, HOLOCARD has failed to put forth any evidence beyond its conclusory allegation that the telephone companies engaged in activities that are barred by the *Sherman Act*. We, therefore, find that the Summary Judgment was proper."
>
> "Motions to Reconsider are addressed to the sound discretion of the Trial Court and are granted only in exceptional circumstances . . . The circumstances of this case are not of the extraordinary nature that would warrant setting the Summary Judgment aside. We conclude that the District Court did not abuse its discretion in denying the *Rule* 59/60 Motion."

The full text of this Memorandum Decision is set forth in the Appendix hereto.

(e) *Jurisdiction*

The Ninth Circuit Memorandum Decision was entered December 20, 1984. Jurisdiction of this Court is invoked pursuant to 28 *U.S.C., Section* 1254(1).

(f) *Constitutional and Statutory Provisions Involved*

This case involves *Sections* 1 and 2 of the *Sherman Act* (*Act* of July 2, 1890, Chap. 647, *Sections* 1 and 2, 26 Stat. 209, as amended; 15 *U.S.C., Section* 1-2) (the *"Sherman Act"*), the text of which is set forth in full in the Appendix. The matter also involves *FRCP Rules* 56(c), 56(e), 59(e) and 60(b)(1) and (6). The full text of the *Rules* is set forth in the Appendix. Relevant portions are as follows:

> *Rule* 56(c):
>
> ". . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . ."

Rule 56(e):

"... When a Motion for Summary Judgment is made and a Motion for Summary Judgment is made and supported as provided in this *Rule,* an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this *Rule,* must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, Summary Judgment, if appropriate, shall be entered against him."

Rule 59(e):

"... A Motion to alter or amend the Judgment shall be served not later than ten (10) days after entry of the Judgment."

Rule 60(b)(1) and (6):

"... On Motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; ... or (6) any other reason justifying relief from the operation of the Judgment ..."

(g) *Statement of the Case*

This is an action under *Section* 1 and 2 of the *Sherman Act* and was brought by HOLOCARD, claiming it was prevented by a conspiracy between respondents from marketing its low-cost, credit card verification system. HOLOCARD alleges this conspiracy was designed to eliminate competition to the credit card devices and systems then in the process of being marketed by respondents. In fact, respondents and their allies have gone forward with their own special credit verification systems and devices and have actively marketed these to merchants in the areas in which HOLOCARD intended to operate. HOLOCARD, on the other hand, has effectively been foreclosed from competing with respondents using its HOLOCARD system (the "System") even though it now holds a patent on the System.

The HOLOCARD System.

This system, invented in early 1975 by THOMAS E. FLOWERS ("FLOWERS") and GORDON S. MAC DONNELL ("MAC DONNELL"), both now principals of HOLOCARD, is a unique, low-cost system for transmitting specific stored data by telephone. It was designed to use existing equipment and services of operating telephone companies, both in the United States and abroad (the "telcos") to provide simple answers (e.g. whether or not a number was on a particular list) in response to low-cost, short-duration phone inquiries. FLOWERS and MAC DONNELL have since patented this invention (Patent No. 4,165,446, dated August 21, 1979).

Early on, the principals of HOLOCARD determined that the first application of the new invention would be for credit card and bank account verification systems. HOLOCARD initially secured a tentative commitment from OPTICAL DATA SYSTEMS, INC. ("ODS"), a manufacturer of holographic equipment, for the needed hardware. ODS worked to obtain commitments from major credit card purveyors to supply regular information on lost, stolen or delinquent credit cards. HOLOCARD had availability to this information through ODS.

The marketing plan envisioned by HOLOCARD entailed inter-connection of its ODS holographic equipment to banks of phone lines at major local telco centers. This equipment would be set up to respond to calls from local merchants who would telephone in to inquire about standing of credit cards offered to them by their customers. The ODS equipment would scan its memory and quickly respond to the merchant with codes for validity. The total duration of the typical call would be approximately 10 seconds.

HOLOCARD had two plans for marketing the System. Plan one would be used when the total costs of the call and of HOLOCARD's response was within the standard message unit charge then charged by the telco to its customers. In 1975 the standard message unit charged to business customers for a local call was five cents ($.05) throughout much of the United States. Under plan one the telcos (or HOLOCARD) would merely count the number of calls from merchants making inquiries to the System. Those calling would not even have to be separately identified. They'd simply be billed automatically by the telcos for the local call just as such merchants would be on any other local business call. The telcos and HOLOCARD would then "split the nickel", the telco retaining two and one-half cents (a sum calculated by HOLOCARD to be $.004 in excess of the total estimated costs and normal profit of the telco) and the other two and one-half cents would be remitted to HOLOCARD for its charges and expenses. HOLOCARD's plan two would be employed if the charges for the incoming calls (for both the telco and HOLOCARD) exceeded the standard message unit charged for the area. This Plan would require that the calling merchant be identified through use of the telcos existing automatic number identification equipment ("ANI"). In such case the merchant would be billed at the special rate agreed to in advance by the telco involved and HOLOCARD. The System, at HOLOCARD's projected use rate, would generate the highest possible level of revenue for the telcos involved because of the extremely short duration of each call and, best of all, since local lines would predominately be used for these calls, the extra revenue generated would go into the pocket of the telco. By way of example, the HOLO-

CARD projections for 1983 for PACIFIC alone showed extra revenues to that telco of $3.1 Million and that figure was calculated using the 1975 standard message unit charge of $.05 per call—not the actual charge in 1983 which was at least twice that amount.

HOLOCARD's Contacts With Respondents.

In April, 1975, HOLOCARD first approached PACIFIC with its proposal for the System. PACIFIC, of course, was a public corporation with stock on both the New York and Pacific Stock Exchanges. A.T.&T owned approximately 90% of its outstanding shares. The HOLOCARD principals presented the proposal to Mr. HAROLD HAUGHT, then PACIFIC's Vice-President of Engineering. His reaction was both immediate and enthusiastic. Encouraged by this, HOLOCARD thereafter contacted twenty-three (23) of the telcos controlled by AT&T and three (3) of the largest telcos controlled by defendant GTE, including GTC (a wholly owned subsidiary). HOLOCARD also received generally favorable reactions from many of them. Nonetheless, by the latter part of 1975, each of the telcos broke off discussions with HOLOCARD, indicating that approval by its parent company was required before more could be done with the implementation of the System.

HOLOCARD then approached executives of AT&T in New York and New Jersey with their proposal for the System. There was a meeting between these executives and a HOLOCARD principal and various additional telephone conversations and correspondence. Early in 1976, however, Mr. W. RICKS LITTELL, then Director of AT&T's Marketing Department, wrote HOLOCARD indicating that its proposal had been turned down and that the matter had been "decided at the highest level". On April 22, 1976, WILLIAM LINDHOLM, then President of AT&T, wrote HOLOCARD stating, in relevant part, "We would not authorize the BELL operating companies to adopt these policies". HOLOCARD understood from the letters and from follow-up conversations that AT&T was advising that it was instructing its telcos to desist from further negotiations with HOLOCARD on the System.

Despite these rejections, HOLOCARD attempted to secure reconsideration of its proposal through Messrs. WALTER A. HAAS, JR., and WILLIAM K. COBLENTZ, then both Directors of PACIFIC. In fact, HOLOCARD's principals met with Mr. COBLENTZ prior to a scheduled June, 1976, joint meeting of the Boards of Directors of AT&T and PACIFIC in New York, to review the matter and provided him with a current summary of the HOLOCARD proposals so that he could present it at the joint meeting. Mr. COBLENTZ, after the meeting, told HOLOCARD's principals that they would be contacted by PACIFIC's President or Chairman regarding the proposal. No contact was ever made.

At about the same time HOLOCARD was discussing the System with AT&T, the principals also approached the management people of GTE at their Stamford, Connecticut headquarters. These contacts were made in person, through telephone conversations and in various correspondence. At length, Mr. JOHN TYMOCZKO, JR., then Director of Service Planning for GTE, advised FLOWERS, one of HOLOCARD's principals, that he intended to contact Mr. HERB JOHNSON of the AT&T Marketing Department to talk about HOLOCARD's proposal. Not long thereafter, on July 1, 1976, Mr. TYMOCZKO wrote HOLOCARD, stating in relevant part, ". . . a final answer . . . in light of present technological and regulatory developments in the area of electronic funds transfer, which includes credit card verification, it would not be advantageous to develop a service utilizing your credit card verification service. Accordingly, we must decline interest."

Respondents' Competing Systems.

Late in 1975, the motivation for AT&T's actions, at least, became clear. They then started to promote their so-called Transaction Network Service ("TNS"). This provided essentially the same sorts of information as was available through the HOLOCARD System. However, instead of using existing telephone facilities, TNS relied upon a new "Transaction Phone" (the "Transaction Phone"), which had been developed by Bell Laboratories and was being manufactured by WESTERN ELECTRIC, both of which were 100% owned subsidiaries of AT&T. Moreover, the TNS relied upon remote data banks, rather than locally situated ones, and presumably generated long-line revenues for AT&T when they were used. Thus, the local telcos would market the TNS system, but whether they would benefit revenue-wise from the operating revenues was problematical.

The marketing effort for the TNS system in California was arranged for by PACIFIC through two banks. One was marketed through SECURITY PACIFIC NATIONAL BANK ("SPNB") and the other was through WELLS FARGO BANK ("WELLS") (collectively the "Banks"). Mr. WILLIAM TOLSON, the Northern California Manager of the SPNB system, told FLOWERS in 1976 that the Bank was involved in a joint venture with PACIFIC on this project.

Respondents' Policies and Competitive Practices.

To begin with, it appears clear that AT&T, at least, had an underlying tough company policy to resist competition from others outside the company on business lines in which that company was involved. Glimpses of this policy are contained in various statements attributed to JOHN DeBUTTS, former Chairman of AT&T's Board, and others which are summarized in the Memorandum Opinion of Judge CHARLES R.

RICHEY, in *Southern Pacific Communications Company, et al.* vs. *AT&T,* (DC DofC, 1983) 556 F. Supp. 825 at pages 890 to 907. These statements generally reflect that a hard line would be taken against any encroachments by competitors of the BELL respondents in AT&T's established monopoly lines of business.

Moreover, evidence presented by HOLOCARD suggests that WESTERN ELECTRIC was selling transaction phones at fictitiously low prices and representing to PACIFIC that use rates would reach unrealistically high levels in order to justify artifically low lease rates and tariffs in proceedings before the California Public Utilities Commission ("PUC"). HOLOCARD believes the purpose in doing so was to foreclose competitors, such as HOLOCARD, from this market.

The similarity of reaction by the respondents to the HOLOCARD proposal appears also to have its roots in the commonality of directors between the BELL respondents, in particular, and the Banks. Mr. CHARLES DUCOMMON, served as Chairman of the Finance Committee of the Boards of Directors of both PACIFIC and SPNB. Mr. WALTER A. HAAS, JR., then Chairman of the Levi Strauss & Company, served as a Director of PACIFIC while PETER HAAS, then President of Levi Strauss, served as a Director of AT&T. Equally, PHILLIP M. HAWLEY, President of Carter, Hawley, Hale Stores, Inc., served as a Director of PACIFIC, while EDWARD W. CARTER, Chairman of Carter, Hawley, Hale Stores, Inc., served as a Director of AT&T. These circumstances strongly suggest that the uniform rejection of the HOLOCARD proposal was a concerted decision of the managements of the BELL respondents, in particular, each knowing exactly what the others were doing, in order to block entry of HOLOCARD into the credit card verification market.

Here again, in late 1976 WELLS, then involved as a marketer of the TNS system, attempted to interfere with ODS, HOLOCARD's supplier, by foreclosing on a delinquent equipment loan. The delinquency was for some $30,000 and foreclosure took place during a temporary cash flow problem at ODS. This, however, occurred at a time when ODS had invested capital of approximately $2 Million. The procedure involved was totally inconsistent with ordinary banking practice and suggests that there was considerably more involved than simply collecting a loan.

PACIFIC and GTC also vigorously opposed the application by HOLOCARD for a tariff before the California PUC which would have permitted it to proceed with the proposal in California. The proceedings in question were initiated January 18, 1977. The case was heard in November and December of 1977, yet the Commission decision was delayed until March 7,

1981. The PUC concluded that it did not have jurisdiction to order the requested servicing arrangements, because the telcos were not dedicated to providing such. The opinion specifically left the issues of monopoly, conspiracy and refusal to deal under the anti-trust statutes to the State or Federal Courts.

The Proceedings Here.

By January 30, 1979, HOLOCARD had to file its complaint in this action, primarily to avoid possible statute of limitations problems which might otherwise bar its recovery. Immediately after filing, respondents took extensive depositions of the HOLOCARD principals (FLOWERS—6 days; MAC DONNELL—2 days). And, the Court required HOLOCARD to submit extensive written statements under *Rule* 11 of the *FRCP* and *Ninth Circuit, Local Rule* 235-3. In addition, HOLOCARD was required to file an extended "in-camera" statement, detailing the theories and evidence which supported its conspiracy claims. On November 30, 1979, the District Court entered its Order to Show Cause requiring the parties to show why a stay of further activity in the matter should not be entered, pending the outcome of the PUC proceedings. On February 26, 1980, over strenuous objection by HOLOCARD, the Court entered its Order staying all further proceedings until thirty (30) days after the decision of the California PUC became final. This happened by May, 1982, and, thereafter, the Court opened discovery until June, 1983, a space of some twelve (12) months.

At that point, the HOLOCARD principals, who had been acting since June 20, 1980, in pro per, engaged Attorney GARY NEAR ("Attorney NEAR") to handle the case for them, and, in particular, to conduct discovery. As Attorney NEAR required, they deposited Fifteen Thousand Dollars ($15,000) in a bank account as security for payment of costs on such discovery. Yet, he took no depositions, sent no interrogatories, requested no documents and did no investigation on the case. And, HOLOCARD's principals were virtually unable to reach him, even by phone. On those occasions when he did talk to them, Attorney NEAR gave them assurances that the case was proceeding and that he expected to meet shortly with Attorney SIEGLETZ, attorney for AT&T, to work out a settlement. This dragged on, without tangible results until Spring, 1983. In fact, in March, 1983, MAC DONNELL contacted HOLOCARD's present counsel to see whether the latter would agree to act as co-counsel with Attorney NEAR on the discovery aspects. Though Attorney HOOY did agree to discuss the situation with Attorney NEAR, HOLOCARD was unable to interest the latter in the concept.

In early May, 1983, respondents filed Motions for Summary Judgment in this matter. Yet, MAC DONNELL wasn't

advised by Attorney NEAR that either of these had been filed until mid-May, 1983. And, it wasn't until the very end of that month, that Attorney NEAR set up a meeting with HOLOCARD's principals to give them portions of these Motions so that they could help him with the responses. The HOLOCARD principals did their best to refute the "factual allegations" contained in the respondents' declarations and otherwise cooperated with Attorney NEAR in preparing their response. The absence of any discovery here severely handicapped them in preparing their replies.

But, the Opposition Brief submitted by Attorney NEAR cited only one case ("*U.S.* vs. *Grinnell Corp.* (1966), 384 U.S. 563") and offered no positive theory on the facts to support a recovery by HOLOCARD. Counsel for the GTE respondents moved to strike the Opposition presented by Attorney NEAR on the grounds of its inadequacy, lack of facts, and violations of the *Rules of Court* (one (1) week late in filing).

Attorney NEAR's conduct of the Hearing on the Motions in the District Court was no better. Not only was he one-half (½) hour late for the pre-hearing meeting with HOLOCARD's principals, but at the presentation in Court he was so poorly prepared that he had to interrupt to ask the principals of HOLOCARD for "facts" to support their claims of conspiracy against the GTE respondents. In short, he was not conversant with events, facts and circumstances of which HOLOCARD had earlier apprised him and offered no effective arguments on its behalf. And, after the Hearing, in an exchange of correspondence, Attorney NEAR tacitly admitted just going through the motions in handling the presentation of the case, stating that he was convinced that the state of the law couldn't afford HOLOCARD grounds for relief against the respondents. Had he said anything like that before the Hearing, HOLOCARD's principals would certainly have removed him and sought a continuance to permit a proper presentation.

On June 27, 1983, HOLOCARD, through present counsel, filed a Motion to Reconsider the prior Summary Judgments. This incorporated declarations of both the HOLOCARD's principals (setting forth the factual information within their knowledge as to the evidence on conspiracy and reciting in detail the difficulties experienced with Attorney NEAR in getting his attention on the case) and of its present counsel (outlining specific required discovery). On August 3, 1983, HOLOCARD filed a First Amended Declaration of Attorney WILLIAM KNECHT, an expert in California PUC matters, indicating that an award of the requested tariff to HOLOCARD would likely have followed had PACIFIC and GTC not vigorously opposed the complaint. Thereafter, and as support for its reply to the opposition by respondents, HOLOCARD

filed declarations by LARRY HAVERKAMP (expert witness on relevant market), by WILLIAM KNECHT (Second Declaration) (to verify that HOLOCARD's anti-trust claims were not considered by the California PUC at its hearing on the complaint and to offer specific evidence on WESTERN ELECTRIC's sales of equipment at prices well below competitive market); by MAC DONNELL (second) (to further amplify the problems experienced with former Attorney NEAR on his handling of the case); and by KENT K. SUTHERLIN, former Officer of ODS (to verify that the equipment needed by HOLOCARD to put into effect its system was available at the time of their discussions with the respondent; that it worked; and that WELLS had indeed sought to put ODS under by its foreclosure proceedings). The latter were all filed August 26, 1983, a full seven (7) days prior to the hearing on the Motion to Reconsider. These all responded to points raised directly or indirectly by respondents in their opposition. HOLOCARD's Motions to Reconsider were heard September 2, 1983, and the Trial Judge denied these, excluding the after-submitted evidence and entering his Order thereon on September 8, 1983. Appeal to the Ninth Circuit followed. This was heard October 2, 1984, and decided by Memorandum of Decision on December 20, 1984.

(i) *Basis for Federal Jurisdiction*

HOLOCARD filed the Complaint in this action in United States District Court on January 30, 1979, for violations of *Sections* 1 and 2 of the *Sherman Act.* HOLOCARD invoked jurisdiction based on the provisions of *Section* 1337 of Title 28, *U.S.C., Judiciary and Judicial Procedure* (28 *U.S.C., Section* 1337) (jurisdiction in commerce and anti-trust regulation matters) and *Sections* 4, 12, and 16 of the Clayton Act (15 U.S.C., *Sections* 15, 22 and 26) (the "*Clayton Act*") (suit by private parties, venue in District Court, and injunctive relief and attorneys' fees).

(g) *Argument*

1. The Decision to award Summary Judgments here departs from accepted precedents and this Court should exercise the power of supervision through Certiorari.

The rulings here unduly restrict the opposition permitted to complainants in resisting Summary Judgment Motions by defendants on *Sherman Act* cases. These required HOLOCARD to produce evidence of conspiracy (in addition to its showing of conscious parallelism of action by the defendants) even though the declaration already presented by HOLOCARD controverted the defendants' claims of legitimate business purpose for their actions and thereby raised triable issues of fact as to whether defendants indeed had any such purpose. These go

beyond this Court's prior decisions and threaten the effectiveness of private action as a vital means of enforcement of the anti-trust policies of the United States. As such, this presents an issue of national significance for decision by this Court.

The Ninth Circuit here, in affirming the decision of the District Court, found that HOLOCARD failed to put forth any evidence beyond its conc'usory allegations that that the telephone companies engaged in activities that are barred by the *Sherman Act.* This finding implies that the Court evaluated not only the evidence presented by HOLOCARD at the time of the Hearing on Respondents' Summary Judgment Motions but also the further materials presented in connection with its *FRCP Rule* 59/60 motions. Thus, the Court's determination has to do with the entire record and this petition will address the question from the same perspective.

Triable Issues Remain on the Complaint

Summary Judgments should be entered only when the pleadings, depositions, affidavits and admissions filed in the case "show that (except as to the amount of damages) there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Rule* 56(c) *FRCP.* This *Rule* authorizes summary judgment "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is . . . (and where) no genuine issue remains for trial . . . (for) the purpose of the *Rule* is not to cut litigants off from their right of trial by jury if they really have issues to try." *Sartor* v. *Arkansas Natural Gas Corp.* 321 U.S. 620, 64 S.Ct. 724 (1944).

In anti-trust cases these general standards are applied even more stringently and summary judgments are granted more sparingly. *Poller* vs. *Columbia Broadcasting System Inc.,* 368 U.S. 464, 82 S.Ct. 486 (1962). As this Court stated in *Poller:*

> "We believe that summary procedure should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised." (368 U.S., at page 473.)

HOLOCARD contends that there is ample evidence of both horizontal and vertical conspiracy on the part of the respondents to violate *Sections* 1 and 2 of the *Sherman Act.* The evidence moreover, supports HOLOCARD's claims that the respondents conspired to monopolize the credit card verification business by creating artificial barriers which would prevent HOLOCARD and others from entry and used that

power to exclude HOLOCARD. Under the circumstances, there were and are triable issues of fact on these matters which must, under existing law, be submitted to trial for resolution.

Per Se Violations of Section 1 of the Sherman Act

Section 1 of the *Sherman Act* provides, in relevant part, that "every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal." While certain conduct proscribed by *Sherman* 1 may be gauged by the "rule of reason", there are acts and practices which are *"per se"* illegal on the face of them. As to the latter, there is no inquiry into factual circumstances and economic data to determine whether an agreement or practice constitutes a reasonable or an unreasonable restraint of trade. Agreements or practices falling into the *per se* category are presumed to be unreasonable. Among the practices falling into this category are price fixing, division of markets, group boycotts and tying arrangements. *United States* vs. *Addyston Pipe & Steel Company,* 85 Fed. 271, Affd 175 U.S. 211 (1899) (Division of Markets); *Fashion Originators Guild* vs. *Federal Trade Commission,* 312 U.S. 457, 61 S.Ct. 703 (1941) (Group Boycotts). It has also been held that it is unreasonable *per se* to foreclose competitors from any substantial market. *International Salt Company, Inc.,* vs. *United States,* 332 U.S. 392, 68 S.Ct. 12 (1947).

The existence of a restraint of trade is considered with reference to a relevant market. Trade is or is not restrained with respect to a particular product or service in a certain geographical area. Thus, it is said that the provisions of the *Sherman Act* have both a geographical and distributive significance. *United States* v. *Yellow Cab Co.,* 332 U.S. 218, 67 S.Ct. 1560 (1947).

The fact that there is a common ownership or control of corporations that are parties to illegal agreements does not liberate them from the impact of the *Anti-Trust Laws. Perma Life Mufflers, Inc.* vs. *International Parts Corp.,* 392 U.S. 134, 88 S.Ct., 1981 (1968). The Court, however, has recently ruled that a parent corporation and its wholly owned subsidiary are incapable of conspiracy with each other for purposes of *Section* 1 of the *Sherman Act. Copperweld Corp* v. *Independence Tube Corp.,* 467 U.S. ____, 104 S.Ct. 2731 (1984). This holding disposes of claims against WESTERN ELECTRIC, and GTC for consipiracy, since both are wholly owned subsidiaries of their respective parent corporations. The holding, however, should not insulate the parent corporation from liability for acts of these subsidiaries, as agents, to prove violations by the whole entity.

Where a *per se* violation of the *Sherman Act* is involved, it has been held that public injury need not be alleged or proved,

since as to this type of violation, public injury is presumed. In general, good intentions or motives are irrelevant. This is especially true when a *per se* violation of the *Sherman Act* is charged. *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 60 S.Ct. 811 (1940). Similarly, good results are generally irrelevant. However, bad intent may be pertinent.

At the very least, the practices involved here must be characterized as *per se* violations of the *Sherman Act.* WESTERN ELECTRIC's own 1979 Price Comparison Pamphlet reflects that the prices for its equipment were across-the-board artifically below market (only 83% of the lowest general trade prices of its competitors). From this it is possible to infer that AT&T through WESTERN ELECTRIC, its wholly owned subsidiary, deliberately underpriced its equipment sold to member companies, including the Transaction Phone, in that and earlier years. The evident purpose for such pricing policies would be to obtain artifically low tariff rates thereby increasing the attraction of such equipment for lease *and* keep competitors (such as ODS, the manufacturer of the equipment intended to be used by HOLOCARD) out of the market. Certainly, the BELL defendants have never provided any information to dispute these inferences at all, not even in the California PUC hearing. Under the circumstances, these practices should be sufficient to permit a factual evaluation by a trier of fact of this issue.

The evidence on division of markets includes the apparent overall market concept, with specific functions for each of the BELL defendants, GENERAL defendants and the WELLS FARGO and SECURITY PACIFIC BANKS (the latter collectively "BANKS") on their individual proprietary credit card verification services (ie, the BELL defendants providing TNS, the principal feature of which was and is the Transaction Phone and the Banks the merchant contacts) and the statements by the Northern California Manager of the SPNB System advising that the Bank was involved as a "joint venture" with Pacific on the TNS System. As far as group boycott, the evidence shows the admitted communications between PACIFIC and AT&T, its parent, and between the BELL and GENERAL respondents on HOLOCARD's proposals for service; the early interest expressed by the telcos (implying a desire to consider seriously going forward with HOLOCARD's proposal were they free to do so) with their subsequent refusal to deal with HOLOCARD, the telcos requiring subsequent contacts to be through their parents, AT&T and GTE (implying that the telco's were not free to act); the virtually simultaneous refusals by AT&T and GTE management of interest in HOLOCARD's proposals and their uniform declination to even discuss the matter further; the efforts by members of PACIFIC's Board (who obviously considered the proposals viable) to secure reconsideration by AT&T's Board, which were rebuffed utterly at the June, 1976,

joint meeting in New York; and the vigorous opposition by both PACIFIC and GTC to HOLOCARD's request for service before the California PUC and otherwise, in the face of clear evidence that the BELL respondents or components thereof, at least, provided or have since provided essentially the same services (e.g. revenue sharing, billing and collections) as were sought by HOLOCARD in whole or in part to others. The Declaration of RAY HIETT, filed in support of the Motions for Summary Judgment by the BELL respondents relates that he was in charge of marketing the TNS System for PACIFIC and he made the decision not to go forward with the HOLOCARD proposal. If an unbiased analysis were intended one would not expect the job to be done by the Pacific official charged with marketing its competing system. Finally, there is PACIFIC's own, August 9, 1983, Advice Letter to the California PUC for a Tariff (No. 14605) (the "Advice Letter") which seeks authority to provide service conforming substantially to HOLOCARD's earlier proposed "Plan No. 2" for its System. (Plan two is described at page 3 of this Petition). The timing of the Advice Letter is particularly significant, in that it came only after the split-up of AT&T was announced for January, 1984, PACIFIC then being on its own and entirely dependent upon its own generated revenues. If anything, this Advice Letter appears to confirm what HOLOCARD earlier said about the desirability and profitability of adopting HOLOCARD's proposals for the System from the standpoint of both PACIFIC and GTC. HOLOCARD's evidence as to conspiracy is discussed in the next section. While the foregoing evidence is, for the most part, circumstantial, it clearly points to the existence of triable factual issues which necessitates reversal of these Summary Judgments.

Section 1 Conspiracy to Restrain Trade

The term "conspiracy" as used in the *Sherman Act* means the union of two or more persons or entities knowingly participating in a common scheme or purpose. Concerted action by parent and subsidiary (other than a wholly owned subsidiary) will satisfy the requirements of the law. *Timkin Roller Bearing Company* vs. *U.S.*, 341 U.S. 593, 71 S.Ct. 971 (1951). To show participation in a conspiracy, it need only be demonstrated that a person with knowledge of the existence of the conspiracy, knowingly performed an act designed to promote or aid in the attainment of the object of that known conspiracy. *United States* vs. *National City Lines, Inc.* (C.A. 7, 1951), 186 F.2d 562. Conspiracies, by their very nature are rarely established, or are seldom capable of proof, by direct evidence or testimony. Usually, only circumstantial evidence is available. *Standard Oil Company of California* vs. *Moore*, (C.A. 9, 1957), 251 F.2d 188. The essentials of a conspiracy in

violation of the *Sherman Act* may be found in a course of dealings or other circumstances as well as in an exchange of words. *American Tobacco Company* vs. *U.S.*, 328 U.S. 781, 66 S.Ct. 1125 (1946).

The leading case holding that an agreement can be inferred from commonality of conduct is *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208, 59 S.Ct. 467 (1939). There, despite a lack of any express evidence that various film distributors actually agreed among themselves to abide by the demands of owners of chains of theaters on minimum admission prices and single feature requirements, the Court upheld a District Court's finding of conspiracy among the distributors, noting that "without substantially unanimous action with respect to the restrictions for any given territory there was a risk to any distributor of substantial loss of the business and goodwill of the subsequent-run and independent exhibitors, but with it there was the prospect of increased profits". This was followed by *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131, 68 S.Ct. 915 (1948) which found the point of drawing an inference of agreement from conscious parallelism scarcely deserving of elaboration, stating:

> "It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concertive action is contemplated and that the defendants conformed to this arrangement," (334 U.S. at 142)
>
> and
>
> "That defendants either participated in evolving this uniform system of clearances or acquiesced in it and so furthered its existence." (334 U.S. at 147)

Theater Enterprises, Inc. vs. *Paramount Film Distributing Corp.,* 346 U.S. 537, 74 S.Ct. 257 (1954) involved a complaint by an owner of a theater in a suburban shopping district near Baltimore who complained of the Trial Judge's refusal to direct a verdict in his favor on a claim that a number of motion picture distributors and exhibitors had acted with conscious parallelism by declining to grant him first-run privileges. The defendants advanced a multitude of substantial business reasons why the grant of first-run privileges to the plaintiff was counter to their individual business interest. In the context of upholding the lower court's refusal to direct a verdict, Mr. Justice CLARK, observed (346 U.S. at 541):

> "This Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a *Sherman Act* offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the

traditional judicial attitude towards conspiracy; but 'conscious parallelism' has not read conspiracy out of the *Sherman Act* entirely."

This explanation as to how the inference from parallel conduct can be explained away by proof of legitimate business consideration was reaffirmed in *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575 (1968). There, the Court specifically discussed the impact of the change in *Rule* 56(e) in 1963 and its relationship with the existing Rule 56(c) FRCP. The Court held that a party cannot rest on the allegations contained in his complaint in opposition to a properly supported Summary Judgment Motion made against him. This means that *Rule* 59(e) places upon the responding party the burden of producing evidence of the conspiracy which he alleges to have existed only after the moving party conclusively shows that the facts upon which the adverse party relied to support his allegations of conspiracy were not susceptible of that interpretation which he sought to give them. Where the facts as to legitimate business purpose of the defendants are controverted, these conflicts would appear to create triable issues of fact.

Here, in support of their Motions for Summary Judgment, respondents offered declarations that claimed: (a) that the principal respondents (GTE, GTC, PACIFIC and AT&T) all made independent decisions not to deal with HOLOCARD; (b) that they each had valid business reasons for not doing so; (c) that there was no consideration given by any of them to excluding HOLOCARD as a competitor; and (d) that any parallelism involved in their refusals was coincidental. The business reasons offered by GTE included that rapid technological and regulatory developments "might well make the HOLOCARD System unfeasible" and that HOLOCARD's proposal could prove burdensome to operating companies and involve services not offered to others. Among the latter specific concerns were that HOLOCARD's proposal would involve (i) a sharing of revenue; (ii) a lending of the telcos caller identification system; (iii) dedication of an entire three digit number which are reserved for special situations (e.g. 911 number) and others could require equal treatment; (iv) HOLOCARD's business was incipient, without prototype and without firm commitments; (v) HOLOCARD's equipment would be on telco premises; and (vi) the telcos couldn't get regulatory authority for such a proposal. The BELL respondents' comments were similar but they also suggested that HOLOCARD's proposal was unwise (anyone could call and get credit verification); and that the proposal wasn't a reasonable business proposition and didn't satisfy any reasonable public need.

HOLOCARD responded with declarations which reflected broadly three separate contentions: (aa) That a collective decision by respondents rather than a number of independent ones was actually what occurred to bar it from access to needed telco services; (ab) that respondents' claims as to exercise of legitimate business judgment in turning HOLOCARD down do not square with the other evidence; and (ac) that there is positive evidence of conspiracy over and above the foregoing points which was introduced to the District Court, so that the Judgments here cannot stand. As to evidence of collective rather than individual decisions, HOLOCARD's declarations showed: (aai) that in April, 1975, HOLOCARD first approached PACIFIC with its proposal for the system, receiving an immediate and enthusiastic reaction from Mr. HAROLD HAUGHT, then Vice-President of Engineering; (aaii) that, encouraged by this, HOLOCARD contacted twenty-three (23) of the telcos controlled by AT&T and three (3) of the largest telcos controlled by GTE, receiving similarly favorable reactions from them; (aaiii) that in the latter part of 1975, each of the telcos broke off discussions with HOLOCARD, indicating that approval from their respective parents was required before they could proceed further on the proposals; (aaiv) that HOLOCARD then approached executives of AT&T in New York and New Jersey to discuss their proposals; (aav) that early in 1976, Mr. W. RICKS LITTELL, then Director of AT&T's Marketing Department, wrote HOLOCARD indicating that its proposal had been turned down and that the matter had been "decided at the highest levels"; (aavi) that on April 22, 1976, Mr. WILLIAM LINDHOLM, then President of AT&T, wrote HOLOCARD stating, in relevant part, "we would not authorize the BELL operating companies to adopt these policies"; (aavii) that HOLOCARD understood from the letters and from follow-up conversations that AT&T was advising HOLOCARD that it had instructed its telcos to desist from further negotiations with HOLOCARD on the system; (aaviii) that despite these rejections, HOLOCARD attempted to secure a reconsideration of its proposal through Messrs. WALTER A. HAAS, JR., and WILLIAM K. COBLENTZ, then both Directors of PACIFIC; (aaix) that HOLOCARD's principals met with Mr. COBLENTZ prior to a scheduled June, 1976, joint meeting of the Boards of Directors of AT&T and PACIFIC in New York, to review the matter and that he asked that a current summary of the HOLOCARD proposals be prepared so that he could present it at the joint meeting; (aax) that HOLOCARD did provide the summary and Mr. COBLENTZ later told HOLOCARD's principals that they would be contacted by PACIFIC's President or Chairman regarding the proposals; (aaxi) that no such contacts were made; and (aaxii)

that similar contacts with GTE executives at their Stamford, Connecticut headquarters resulted in a similar rejection, this by letter from Mr. JOHN TYMOCZKO, JR., then Director of Service Planning for GTE. Additionally, the declarations submitted by Messrs. TYMOCZKO of GTE, and LITTELL of AT&T, both reflect contacts between them on the HOLOCARD system, the latter being through HERB JOHNSON who worked for Mr. LITTELL in AT&T's Marketing Department, which conversations apparently took place before the letters indicating refusal by the respective parent companies were sent to HOLOCARD. Curiously, respondents failed to submit a declaration from HERB JOHNSON on his telephone conversation to Mr. TYMOCZKO. No explanation was offered for their failure to do so. An inference can perhaps be drawn from that fact. The LITTELL declaration also reflected discussions with PACIFIC's Marketing Department on the HOLOCARD's proposal in October, 1975, and the declaration of Mr. RAYMOND A. HEITT, then Product Manager-Data in PACIFIC's Marketing Department, shows a similar conversation with Mr. HOWARD DEIMEL in AT&T's Marketing Department. These circumstances plainly imply that there was mutual communication among the various respondents as to the HOLOCARD proposal and that the decision, at least insofar as the BELL respondents are concerned came directly from AT&T's highest levels of management. Thus, there's certainly a question of fact for resolution on the issue of alleged "independent decision making" by the individual respondents.

Moreover, the respondents' claims that the decisions to refuse the HOLOCARD's proposals were result of the exercise of their legitimate business judgments do not conform to reality. HOLOCARD's evidence shows: (abi) that despite their claims to the contrary, the telcos in 1975 and since have been involved in revenue sharing arrangements with both other utilities (e.g., AT&T other telcos, etc.) and with customers (e.g., owners of premises where pay phones are located, motel and hotel operators on room phones, etc.); (abii) that these programs all involve call counting, billing and collection of revenues from parties who use the services, all of which the respondents claimed as bases for turning down HOLOCARD's service request; (abiii) equally, PACIFIC's Advice Letter seeks to establish a new tariff for information services, which is virtually identical to that requested by HOLOCARD under its "Plan 2"; (abiv) that the timing of this Advice Letter, coming as it did just before the Court ordered breakup of AT&T when new revenue sources are essential to PACIFIC's own economic situation raises serious questions (both as to the reality of their earlier claims of independent action; and of their contention that HOLOCARD's proposal was not a reasonable business

proposition and did not satisfy a reasonable public need); (abv) that respondents apparently share revenues on a regular basis with suppliers of information and providers of services on news, weather, time, sports information, aural sex dialing and similar projects; (abvi) that the claim that assignment of a three-digit exchange to HOLOCARD would be too complicated for implementation is unconvincing, particularly since this was one of only several proposals by HOLOCARD, the telcos never getting to serious discussions on the engineering aspects of putting HOLOCARD's System into effect (the telcos having only recently assigned number "976" for such information services yet were unwilling to even consider such assignment for HOLOCARD); (abvii) that respondents' claim that the telcos couldn't get regulatory approval for HOLOCARD's project had they sought it rather than fought it is clearly unfounded, the First Declaration by attorney WILLIAM KNECHT ("KNECHT"), an expert on handling matters before the California PUC, setting forth his opinion that approval could have been obtained had PACIFIC and GTC not actively opposed HOLOCARD's Complaint; (abviii) that the claimed inconvenience of having HOLOCARD equipment on the telco premises is without merit is shown by the small area which such equipment would occupy (12 square feet), by the fact that Mr. HAUGHT was the one who originally suggested such placement for PACIFIC's convenience, and by the undisputed testimony of HOLOCARD's principals that such was not obligatory; and, (abix) that the claim that HOLOCARD's project was only incipient, rather than concrete, flies in the face of the Declaration by KENT K. SUTHERLIN, former Director and principal officer of ODS, which shows that the ODS equipment which was to be utilized by HOLOCARD did work, was installed and was in use over telephone systems in two states, and sufficient equipment could be made available to implement the system. Under the circumstances, triable issues of fact plainly remain as to whether the respondents' claims of exercise of reasonable business judgment are sustainable, and, as such, these constituted disputed issues of material fact requiring a trial.

Additionally, there is ample evidence of the existence of a conspiracy under the decisions. In this connection, the Ninth Circuit has previously applied a three-element test for determining whether an inference of conspiracy is permissible based upon "conscious parallelism" in conduct. *Zoslaw* vs. *MCA Distributing Corp.*, (C.A.9, 1982), 693 F.2d 870. The first element is that there must be a showing of sufficiently similar business behavior to warrant the inference. Second, there must be a showing that the parallel acts were against each alleged conspirator's economic self-interest. Thirdly, there must be a

satisfactory demonstration of a motivation on the part of each participant to enter into an agreement. *id.*

The existence of a conscious parallel action is obvious, given the simultaneous break-off of discussions by all local telcos requiring HOLOCARD to deal through their respective parent corporations. This was followed by the virtually concurrent rejections by the parent corporations, after admitted consultation between ranking officers in their marketing organizations, which also points to mutuality of action. The evidence as to shared directors also bears on this. Showing that the parallel acts of the individual defendants were against each's economic self-interest is more difficult. The most obvious case of this is that of the local telcos. HOLOCARD estimated that PACIFIC alone could have expected to generate an estimated $3,168,000 in incremental income for 1983 alone from implementation of HOLOCARD's credit card verification system, and all without any substantial new capital investment by PACIFIC. This figure was calculated based upon a charge of five cents ($.05) per call to the merchant involved, which would have produced estimated revenues to the telco of fifteen cents ($.15) per minute. The estimated gross revenues from the Transaction Phone, which the telcos did implement, are estimated at six cents ($.06) per minute. So the expected incremental revenues from the HOLOCARD System to the telcos (PACIFIC and GTC) are two and one-half (2½) times those from the latter. Added to this is the fact that the Transaction Phone involved substantial capital investment by the telcos by purchase of new phone equipment, an investment which was not directly required for the HOLOCARD System. The revenue figures for incremental income (though not total annual revenues) for GTC are estimated to be comparable. So far as the record is concerned these estimates are the only figures available, as neither GTC nor PACIFIC have provided any others. As far as AT&T, though it would not benefit directly from the implementation of HOLOCARD's System (as most calls on the System would be local rather than "long-line" from which AT&T could directly get revenues), it could receive substantial returns from PACIFIC (by virtue of its ownership of approximately 90 percent of the outstanding common stock) and from the other telcos by way of dividends on shares. Yet, AT&T elected not to allow HOLOCARD access to its telcos, thereby foregoing these incremental revenues. As far as GTE is concerned, the same considerations would apply as they have 100 percent of the outstanding shares of GTC, its subsidiary. WESTERN ELECTRIC stood to gain by implementation of the HOLOCARD System through increased usage of existing telephone facilities by the telcos which would expand the demand for replacement equipment and, more significantly, create a market for upgraded equipment to improve existing

exchanges. Yet, significantly, WESTERN did not seek to cause AT&T to adopt the HOLOCARD System. Thus, there is evidence that each of the respondents acted contrary to what would, on the face of it, be perceived as its own economic interest in rejecting the HOLOCARD proposal.

As far as motivation for entering into an agreement to bar HOLOCARD's credit verification system, AT&T is the clearest case in that area. The company had its TNS System and Transaction Phone, developed by BELL LABS and manufactured by WESTERN ELECTRIC, both AT&T subsidiaries, which were designed for use in credit card verification and which AT&T was in 1975 in the process of bringing to market. AT&T had to be concerned that HOLOCARD's System, with its considerably lesser cost, would take customers away from its TNS system. This would have direct impact on revenues, since TNS was expected to generate equipment sales for WESTERN ELECTRIC and, as well, to provide substantial, long-line and other revenues for AT&T. WESTERN ELECTRIC's motive was to sell its Transaction Phone. The BANKS were also involved in sales and went along. PACIFIC was simply following the dictates of its parent on the decision not to implement the HOLOCARD System.

More significantly, HOLOCARD's evidence is susceptible of the interpretation that the decision of the respondents and their allies to oppose HOLOCARD's plans was prompted by their desire to foster and maintain their monopoly position in special credit card verification services, excluding competition such as HOLOCARD absolutely. Using its monopoly position to exclude competition is arguably part of the underlying BELL respondents' announced company policy. (See page 5 and 6 of this Petition). These statements by the BELL respondents' management reflect that a very hard line would be taken against any encroachments by competitors of the BELL respondents in their established lines of business. This raises the inference that the actions of the BELL respondents, at least, were purposeful and consistent with the then policy of the parent company to maintain its exclusive position.

The motives of GTE are more obscure. HOLOCARD believes that discovery would develop that GTE believed HOLOCARD's device would interfere with the marketing of a device similar to the Transaction Phone which they intended to provide independently. They also had arrangements with the BANKS and manufacturing concerns on this device. Here again, the GTE system would generate long-line and other revenues for the parent which were not forthcoming from the HOLOCARD System. Thus, there was motivation on GTE's part to join the conspiracy and block HOLOCARD access to this market. Thus, there was ample evidence of conspiracy

under the holding of *Zoslaw* vs. *MCA Distributing Corp., supra.* to raise triable issues of fact for a jury.

Section 2 Exercise of Monopoly Power

The essential elements which HOLOCARD must establish to prove a private monopolization claim under *Sherman* 2 are: (1) that the respondents possessed monopoly power in the relevant market; (2) that respondents unlawfully exercised that power to attain, or maintain, a monopoly in the relevant market; (3) that HOLOCARD suffered injury as a result of those unlawful acts; and (4) that damages in a reasonably ascertainable amount can be proved. *United States* vs. *Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698 (1966); *Brunswick Corp.* vs. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690 (1977); *Berkey Photo, Inc.* vs. *Eastman Kodak Co.* (CA 2, 1979) 603 F.2d 263, cert. den. 444 U.S. 1093 (1980).

Monopoly power is defined as the power to "control prices or exclude competition" in the relevant market. The existence of such power ordinarily may be inferred from a predominate share of the market. *United States* vs. *Grinnell Corp., supra.* The relevant market is defined both by the geographic area in which the parties effectively compete (*Tampa Electric Co.* vs. *Nashville Coal Co.*, 365 U.S. 320, 81 S.Ct. 623 (1961)), and the products or services which are in fact reasonably interchangeable with one another. *United States* vs. *E. I. du Pont de Nemours Co.*, 351 U.S. 377, 76 S.Ct. 994 (1956). The relevant market, then, determines the "area of effective competition" in which respondents' alleged market power vis-a-vis HOLOCARD is to be measured. *Standard Oil Company* vs. *United States*, 337 U.S. 293, 69 S.Ct. 1051 (1949).

As far as relevant product market, the Declaration of LARRY HAVERKAMP ("HAVERKAMP"), Associate Professor and Director of Banking and Finance at Golden Gate University and former Staff Economist with the Federal Trade Commission, submitted by HOLOCARD along with those of FLOWERS and the First MAC DONNELL Declaration reflects their mutual assessment that the credit card verification business constituted a relevant market and that the services offered by the respondents and those proposed by HOLOCARD were competitive in that market. The geographic market would initially involve local calling areas in California with PACIFIC and GTC as the areas of first interest. This would be the first stage only as HOLOCARD's coverage would be expanded geographically to other areas as rapidly as possible, and, as well, could incorporate verification services on long lines at remote data banks.

As far as respondents' monopoly power, FLOWERS' Declaration shows that both PACIFIC and GTE, through GTC, control an overwhelming share of the local telephone

market in California. Nationwide figures show AT&T and its telcos with 80% of the total telephone business domestically. GTE and its telcos have another 10%. Thus, together respondents control 90% of the market. Under any definition the respondents together have monopoly power.

As far as intent, the law is clear that the party suing is not required to prove in every instance that the defending parties acquired or maintained their monopoly power by means of exclusionary, unfair or predatory acts. The requisite intent can be inferred if the defending parties maintain their power by conscious and willful business policies, however legal, that inevitably result in the exclusion or limitation of actual or potential competition. *United States* vs. *Aluminum Company of America* (CA 2, 1945, L. Hand) 148 F.2d 416; *Hecht* vs. *Pro-Football, Inc.* (CA of DC, 1971) 444 F.2d 931.

HOLOCARD's declarations reflect that respondents exercised their monopoly power by effectively barring HOLOCARD's entry into this relevant market. AT&T and GTE did so directly initially by refusing to allow HOLOCARD access to negotiate with their respective telcos. In addition, HOLOCARD contends that the respondents erected various artificial barriers to market entry — such as, the regulatory process itself which they use to their advantage, their control of "essential facilities", their massive capital, enormous size and to an extent, customer brand loyalty. HOLOCARD believes that these elements can be substantiated by proof if effective discovery can be completed on its behalf.

One aspect is sure, respondents were well aware that either HOLOCARD had to obtain approval of the California PUC for a contract or a tariff had to be obtained by the telcos before it could go into business here. And, from declarations of Attorney KNECHT, were HOLOCARD unopposed at the PUC, it would have obtained Commission approval for its proposal. Yet, PACIFIC and GTC seized upon opposition at the PUC as an opportunity to increase HOLOCARD's costs and to delay its entry into this competitive market by vigorously opposing the HOLOCARD Complaint. In the end, PACIFIC and GTC were able to bar HOLOCARD's entry into this market — not because of the merits — but because the PUC believed that it lacked power to force PACIFIC and GTC to provide the services necessary to implement the System.

Equally, it would appear that the "essential facility" doctrine would provide a basis for a triable issue of fact here. Under this doctrine, where facilities cannot practicably be duplicated by would-be-competitors, those in possession of these facilities are required to allow them to be shared on fair terms. It is an illegal restraint of trade to foreclose the scarce facility in such circumstances. *Otter Tail Power Co.* vs. *United*

States, 410 U.S. 366, 93 S.Ct. 1022 (1973); *Hecht* vs. *Pro-Football, Inc.,* (CA of DC, 1971), supra. A facility should be deemed "essential" if duplication would be economically infeasible and if denial of its use would inflict a severe handicap on potential market entrants. *Hecht* vs. *Pro-Football, Inc.* (DC Cir. 1977) 570 F.2d 982, 992, *cert. den.* 436 U.S. 956 (1978).

In this instance, the telco facilities are clearly within the definition of "essential facilities", as far as HOLOCARD's business proposition was concerned. The question of whether HOLOCARD has been afforded an opportunity to share these on fair terms is certainly one to be evaluated by an appropriate trier of fact. To say that the respondents offered to provide service to HOLOCARD on the same terms and under the same tariffs as those offered to other customers is no answer here. Clearly, the combination of service requirements of HOLOCARD was unusual and required adjustments to afford them fair access to these local facilities. Moreover, the services HOLOCARD requested were long offered by respondents on a piece-meal basis to other customers. Equally, HOLOCARD believes that these services have since been offered to others in groupings similar to those requested by HOLOCARD. The recent Advice Letter from PACIFIC offering virtually the identical services requested by HOLOCARD under its Plan 2 is clear example. On the face of it, these facts raise questions of fairness for evaluation by the trier of fact, requiring reversal of the Summary Judgments here.

2. In these circumstances denial of HOLOCARD's Motions to Reconsider was a deprivation of due process and Certiorari is needed to exercise this Court's supervisory responsibility.

This aspect involves a substantial question affecting the administration of justice under the *Federal Rules of Civil Procedure.* The decisions of the Court do not define specific limits on the discretion of the District Court which is to be exercised in situations involving *Rules* 59 and 60 *FRCP.* In this case, the District Court not only granted Summary Judgment where triable issues of fact were shown to exist but also refused to consider evidence submitted between the time the Motions to Reconsider were filed and before the hearing thereon was had and to afford further opportunity for HOLOCARD's counsel to do additional discovery before ruling. A copy of the Reporter's Transcript of proceedings on September 2, 1983, is included in the Appendix.

The Rule 59 Motion

Under the *Rules,* a motion to alter or amend a Summary Judgment entered in the matter may be brought not later than ten days after entry of the Judgment. Rule 59(e). Although this motion is to "alter or amend" the Courts have taken a flexible approach and have included within its scope motions to

vacate or set aside Summary Judgment. *Stephenson* vs. *Calpine Conifers II, Ltd.* (CA 9, 1981) 662 F.2d 808. A motion under *Rule* 59 is addressed to the sound judicial discretion of the District Court. There is no rigid or fixed formula for how this principle is to be applied. It is for the District Court to apply the principle so that substantial justice is done on the facts of the individual case. In the exercise of a sound discretion the District Court may open the Judgment if one has been entered, take additional testimony, and direct the entry of a new judgment. *Moore's Federal Practice (Second Edition), Volume 6A,* paragraph 59.05(5), pages 59-47 to 54. Three specific grounds are most commonly employed in actions under this rule: manifest error of law, error of fact and newly discovered evidence. *Moore's id.,* paragraph 59.07, pages 59-72 to 74; see *Brown* vs. *Wright* (CA 9, 1978) 588 F.2d 708.

In the District Court HOLOCARD contended that there was ample evidence of respondents' violations of *Section 1* of the *Sherman Act* to create triable issues of fact. The evidence specifically reflected involvement in price fixing, division of markets and group boycotts, all of which are *per se* violations of the *Sherman Act.* In addition, HOLOCARD pointed to specific evidence of conspiracy to monopolize which supports both a violation of both *Sherman* 1 and *Sherman* 2 when coupled with monopoly power and exercise of that power in the market for credit card verification. Therefore, the Court lacked discretion to deny HOLOCARD's Motion to Reconsider and in doing so committed reversible error.

The District Court's Refusal to Consider Evidence

FRCP Rule 6(d) provides that when a Motion is supported by affidavit, the affidavit shall be served with the Motion. The *Ninth Circuit Local Rules* (the "*Local Rules*") afford the Trial Judge leeway to authorize later filing of declarations by specific language making exception where "otherwise ordered or permitted by a Judge." *Local Rule* 220-2. The *Local Rules* permit filing of a reply to the opposition not less than seven (7) days preceding the noticed (or continued) date of hearing. *Local Rule* 220-3. There is no rule regulating filing of declarations with the reply to the opposition.

In this instance HOLOCARD filed its original Motion to Reconsider on June 27, 1983. This incorporated declarations of both of HOLOCARD's principals and of its present Counsel. On August 3, 1983, HOLOCARD filed a First Declaration of attorney WILLIAM KNECHT, an expert in California PUC matters, indicating that award of the requested tariff to HOLOCARD would likely have followed had PACIFIC and GTC not vigorously opposed the Complaint. Thereafter, and as support for its reply to the opposition by respondents, HOLOCARD filed declarations by LARRY HAVERKAMP (expert witness

on relevant market), by WILLIAM KNECHT (Second) (to verify that HOLOCARD's anti-trust claims were not considered by the California PUC at its hearing on its Complaint and to offer specific evidence on WESTERN ELECTRIC's sales of equipment at prices well below competitive market), by MAC DONNELL (Second) (to further amplify the problems with former Attorney NEAR on his handling of the case) and by KENT K. SUTHERLIN, former officer of ODS (to verify that the equipment needed by HOLOCARD to put into effect its System was available at the time of their discussions with the respondents; that it worked; and to provide further evidence of WELLS efforts to put ODS under by its foreclosure procedures). The latter were all filed August 26, 1983, a full seven (7) days prior to the hearing on the Motion to Reconsider. These all respond to points raised directly or indirectly by respondents in their opposition. As such, they should have been considered but were not so.

Moreover, the clear policy of *Rule* 56 is that the responding party to a Motion for Summary Judgment be given ample opportunity to obtain evidence necessary to justify its opposition. Where it is shown that the opposing party cannot for reasons stated present by affidavit facts essential to justify its opposition, the Court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or deposition to be taken or discovery to be had or may make such other order as is just. *Rule* 56(f).

In this instance the declaration of WILLIAM J. HOOY filed with the Motion to Reconsider details extensive discovery (e.g. Interrogatories, Requests for Admission, and Depositions) which, from HOLOCARD's perspective, were needed to support its position. HOLOCARD was not thereafter afforded opportunity to conduct such discovery. The fact that HOLOCARD was effectively foreclosed from pursuing these avenues for more than 3 of the 5 years that the case was pending (for over 2 years by Court Order and a further 1 year by circumstances) argues strongly for an exercise of discretion by the Court in deferring decision on the drastic remedy of Summary disposition until full opportunity had been allowed for HOLOCARD to prove its case. Equally, HOLOCARD's difficulties with Attorney NEAR (as detailed in the following section) further argue that HOLOCARD should have been permitted delay to afford it a day-in-court on these difficult issues. In these circumstances, the Trial Judge's failure to consider the further Declarations filed in August, 1983, on behalf of HOLOCARD prior to the hearing date on its Motion to Reconsider resulted in a deprivation of due process, which further mandates the intervention of this Court.

3. Denial of HOLOCARD's *FRCP Rule* 60(b) Motion in the face of proof of incompetence and gross and inexcusable

misconduct by its former counsel goes to the essence of the Constitutional guarantees of a fair trial and Certiorari is necessary to correct this injustice.

Fundamental to our system of justice is the right to a fair hearing which can only be had if each of the parties are represented by competent and diligent counsel. Where counsel abrogates his responsibilities so that the party's position cannot be presented, fair hearing is impossible. This is particularly the case where counsel conceals the facts relating to his derelictions so that the party who he represents is unaware of the situation. Injustice inevitably is the result. This case involves just such a situation. Relief from these judgments is essential both to correct this manifest injustice and to provide guidance for the District Courts in other instances where counsel similarly shirks his responsibilities.

The Rule 60(b) Motion

FRCP Rule 60(b) provides that upon motion and upon such terms as are just, the Court may relieve a party from a final judgment, order or proceedings for reasons, including, among others: (1) mistake, inadvertence, surprise or excusable neglect; or (6) any other reason justifying relief from the operation of the judgment. Where the case falls within one of the recognized grounds for relief, the Court's determination to grant or deny relief normally involves a discretionary appraisal of the facts of the particular case and other relief, if any, to be granted. The matter involved there, then, is largely within the sound judicial discretion of the District Court, but such will be reversed is such is abused. *SEC* v. *Seaboard Corp.* (CA 9, 1982) 666 F.2d 414 (reversing a default judgment entered for defendant's failure to pay money sanctions); *Russell* v. *Cunningham* (CA 9, 1960) 279 F.2d 797 (abuse of discretion under circumstances to deny 60(b)(1) motion).

As far as the "other reason" clause of *Rule* 60(b)(6), this is clearly designed to vest the Courts with authority to enable them to vacate judgments whenever such action is appropriate to accomplish justice. *Moore's Federal Practice (Second Edition), Volume 7,* paragraph 60.27(1), pages 60-264 to 65. The provision is, however, subject to the limitations that it is not intended to apply to cases where the reason given is one stated in the other clauses of that section of the *Rule* and further that the reason advanced must be such as to justify relief. *id.,* page 60-266. The Courts have had real difficulty with the question of whether relief can be afforded under *Rule* 60(b)(6) to the litigant who has an incompetent or sloppy lawyer. If the conduct of the lawyer is excusable it falls within *Rule* 60(b)(1). But, the greater the negligence or the more willful the conduct of the attorney, the less excusable the conduct is. On the other hand, the more inexcusable the conduct of the attorney the

greater the natural sympathy for the ultimate victim, the client. The latter considerations have, at least, caused one Court to give relief to a plaintiff where his case was dismissed for failure to prosecute due to neglect of counsel and when two years later, through different counsel, plaintiff filed a motion to vacate the judgment, which motion was supported by a declaration from former counsel to the effect that he had been beset with personal problems relating to the illness of his wife and the death of his parents at the time he dropped the ball and by declarations from plaintiff indicating he had made "numerous inquiries" of his former counsel and the response had been either a "refusal to reply" or assurances that the case was proceeding and would be settled soon. The District Court dismissed the motion for relief and the Court of Appeals reversed based on *Rule* 60(b)(6). *L.P. Steuart, Inc.* vs. *Matthews* (CA D.C., 1964), 329 F.2d 234. To the same effect are *Boughner* vs. *Secretary of Health, Education and Welfare* (CA 9, 1978) 572 F.2d 976; and *United States* vs. *Cirami,* (CA 2, 1977) 563 F.2d 26.

Inexecusable Neglect by HOLOCARD's Former Counsel

In our situation the evidence would certainly support a finding of inattention, slovenliness and misstatements by Attorney NEAR. From February 26, 1980 to mid-June, 1982, HOLOCARD was precluded from conducting discovery. HOLOCARD's principals had been acting since June 20, 1980, as their own counsel. They then engaged Attorney NEAR to move the case. At his insistence they deposited $15,000 in a bank account as security for payment of costs, including charges for depositons, trial, copying, expert witnesses and similar expenses. MAC DONNELL, who was the principal HOLOCARD contact with Attorney NEAR, stated that, thereafter, he was virtually unable to reach Attorney NEAR, even by phone. Rarely, if ever, did Attorney NEAR return calls. When MAC DONNELL could reach Attorney NEAR, he received assurances that the case was proceeding (e.g. Attorney NEAR expected shortly to meet with Attorney SIEGLETZ, Attorney for AT&T, to work out a settlement). When nothing materialized, MAC DONNELL began pressing Attorney NEAR to begin discovery on the case. There was, at length, a conference at the offices of Counsel for AT&T in Spring, 1983, but this didn't result in any positive conclusion. In fact, MAC DONNELL contacted HOLOCARD's present Counsel in March, 1983, to see whether the latter would agree to act as co-counsel with Attorney NEAR so that the discovery aspects could be truly put in motion. Though Attorney HOOY did agree to discuss the situation with Attorney NEAR, MAC DONNELL was unable to interest the latter in the concept. There was, as a result, no contact between the two. Under the circumstances

there is a compelling basis for relief under Rule 60(b)(6), and it was an abuse of discretion amounting to a deprivation of the constitutional right to a fair hearing not to grant HOLOCARD's Motion.

Setting Aside the Judgment for Fraud.

The Court also has power to set aside a judgment for fraud upon the Court. *Rule* 60(b). *Moore's, id.,* paragraph 60.33, page 60-359. Here again, failure to act can result in denial of a fair hearing and violate Constitutional guarantees.

The evidence reflects that HOLOCARD was denied a fair hearing on the Summary Judgments by the actions of its former counsel, Attorney NEAR. Though the respondents' motions for Summary Judgment were filed in early May, 1983, (with a hearing date of June 3, 1983) MAC DONNELL wasn't advised that these had been filed until mid-May, 1983. At the very end of that month, Attorney NEAR finally worked out a meeting with HOLOCARD's principals and gave them copies so that they could help him with the responses. Indeed, MAC DONNELL states that he had not even been advised by Attorney NEAR that GTE and GTC had filed for Summary Judgment until June 3, 1983, which was the actual date of the hearing on these Motions. In fairness, MAC DONNELL admits having gone over declarations of Messrs. EHLERS and TYMOCZKO, both employees of the GTC respondents, with Attorney NEAR and making comments in response. Nonetheless, MAC DONNELL indicated that he assumed the latter declarations were submitted as part of the package on behalf of the BELL respondents. On reflection and after he went home he did suspect the truth, but he wasn't able to reach Attorney NEAR until June 3, 1983 to confirm the actual situation. In any event, the HOLOCARD principals did their best to refute the "factual allegations" in the respondents' declarations and otherwise cooperated with Attorney NEAR to prepare the response to the respondents' Summary Judgment Motions.

Despite these efforts, the opposition Brief submitted by Attorney NEAR cited only one case ("*U.S.* v. *Grinnell Corp.* (1966), 384 U.S. 563") and offered no positive theory on the facts to support recovery by HOLOCARD. In fact, counsel for GTC and GTE moved to strike the opposition presented by Attorney NEAR on grounds of its inadequacy, lack of facts, and violations of the *Rules of Court* (one (1) week late in filing).

Apparently, Attorney NEAR's conduct of the Hearing on the Motions was no better. Not only was he one-half (½) hour late for the pre-hearing meeting with HOLOCARD's principals, but at the presentation in the Court he had to interrupt to ask the principals for "facts" to support their claim of conspiracy against GTE and GTC. Moreover, after the Hearing in an exchange of correspondence Attorney NEAR tacitly admitted

just going through the motions in handling the presentation of the case, stating as his reason that he was convinced that the state of the law didn't afford HOLOCARD grounds for relief against the respondents. He certainly made no mention of this conclusion before the Hearing. Indeed, had he said anything like that MAC DONNELL and the other HOLOCARD principal, FLOWERS, would certainly have removed him and sought a continuance to permit a proper presentation. These considerations further require that this Court intervene to reverse the Order denying HOLOCARD's Motions to Reconsider.

Conclusion.

WHEREFORE, HOLOCARD respectfully prays that a Writ of Certiorari issue.

DATED: March 18, 1985.

WILLIAM J. HOOY, *Attorney for Petitioner* HOLOCARD

ORIGINAL
FILED
June 14, 1983
WILLIAM L. WHITTAKER
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

HOLOCARD, a California general partnership,

Plaintiff,

vs.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC CO., INC., GENERAL TELEPHONE AND ELECTRONICS CORPORATION, GENERAL TELEPHONE COMPANY OF CALIFORNIA, SECURITY PACIFIC NATIONAL BANK, and WELLS FARGO BANK,

Defendants,

No. C-79-0182 EFL

MEMORANDUM OF DECISION

Plaintiff in this action seeks damages for alleged violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. Specifically, plaintiff alleges that defendants conspired to restrain interstate commerce in the sale and use of automated credit verification and information systems, conspired to monopolize and to attempt to monopolize the interstate commerce in the sale and utilization of such systems, and attempted to monopolize and did monopolize the sale and utilization of such systems. Plaintiff alleges that defendants accomplished the above antitrust violations (1) by agreeing to deny plaintiff

access to the telephone systems maintained by defendants for public use in the unique configuration required for plaintiff's automated credit verification system, and (2) by conspiring and acting to defeat plaintiff's complaint filed with the California Public Utilities Commission requesting that defendants be required to provide the type of service needed by plaintiff.

Defendants moved for summary judgment on all claims. After due consideration of the memoranda and evidence submitted by the parties and the arguments of counsel, this Court granted defendants' motion for summary judgment. Reasons for the decision are set forth below.

While this Court is cognizant of the duty to proceed with caution when considering summary judgment in antitrust cases, *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464, 473 (1962), summary judgment pursuant to Rule 56 is nonetheless appropriate "where the record before the court on the motion reveals the absence of any material issue of fact and [where] the moving party is entitled to judgment as a matter of law." *Portland Retail Druggists Association* v. *Kaiser Foundation Health Plan,* 662 F.2d 641, 645 (9th Cir. 1981). Once the moving party has carried the burden of demonstrating the absence of an issue of material fact the opposing party must " 'present specific facts demonstrating that there is a factual dispute about a material issue.' " *Zoslaw* v. *MCA Distributing Corp.,* 693 F.2d 870, 883 (9th Cir. 1982) (quoting *Program Engineering* v. *Triangle Publications,* 634 F.2d 1188, 1192 (9th Cir. 1980)).

In order for plaintiff to succeed on its claim for violation of section 1 of the Sherman Act plaintiff must prove that there was a contract, combination or conspiracy in restraint of trade. 15 U.S.C. § 1. Some form of combination or conspiracy must also be shown in order for plaintiff to succeed on its claim for violation of section 2 of the Sherman Act by reason of a conspiracy to monopolize trade. 15 U.S.C. § 2.

Defendants' affidavits all denied any conspiracy with the others. While the declarations submitted by plaintiff purport to dispute factual issues, they do not present any direct evidence that there is a dispute as to the material issue of conspiracy. Without such evidence plaintiff must at least present circum-

stantial evidence sufficient to support the inference of a "conscious parallelism" conspiracy theory. *See Zoslaw* v. *MCA Distributing Corporation, supra,* 693 F.2d at 884.

Courts require three elements for the inference of conspiracy based on "conscious parallelism." First, there must be a showing of sufficiently similar business behavior. *See id.; Independent Iron Works, Inc.* v. *United States Steel Corp.,* 322 F.2d 656, 661 (9th Cir.), *cert. denied,* 375 U.S. 922 (1963). Defendants' declarations demonstrate that the telephone companies acted similarly in declining to provide the service requested by plaintiff.

Second, there must be a showing that the parallel acts were against each alleged conspirator's economic self interest. *See Zoslaw, supra,* 693 F.2d at 884 (and cases cited therein). Defendants' declarations provide ample evidence of legitimate business reasons to justify their actions. Additionally, plaintiff filed a complaint with the California Public Utilities Commission (PUC) in early 1977 seeking an order requiring Pacific Telephone and Telegraph Company (PT&T) and General Telephone Company (GTC) to provide the unique services requested by plaintiff. In decision No. 92791, issued March 17, 1981 (a copy of which was properly submitted by defendants), the PUC declined to order the utilities to provide the services under one or the other of the plans proposed by Holocard. The factual findings of the PUC include:

> 4. [The utilities] have not previously shared any of their standard message rate charge with businesses not themselves public utilities.
>
> 8. Assignment of a special three-digit code to [Holocard] would not be an efficient allocation of such a code.
>
> 9. [Holocard's] second alternative would require the telephone companies to separately bill a surcharge representing the price of [Holocard's] services used by the customer.
>
> 10. Under both plans, the telephone companies' billing and collecting capabilities would be used.
>
> 11. The telephone companies have not previously offered their billing or collecting capabilities to non-utilities.

Such findings are accorded at least evidentiary weight. *See Carter* v. *American Telephone & Telegraph Company,* 365 F.2d 486, 491-92 (5th Cir. 1966).

Plaintiff not only failed to file a timely opposition to defendants' motion for summary judgment, pursuant to Local Rule 220-3, but the declaration of Thomas E. Flowers attached to the untimely filed opposition and the declaration of Gordon Mac Donnel submitted five days thereafter present no specific facts demonstrating a material issue with regard to the good faith business basis of the decisions made by the telephone companies. Even considering the untimely filed declarations submitted by plaintiff, at best they merely quibble with defendants' descriptions of details of the credit verification system proposed by plaintiff and purport to cast doubt on the credibility of defendants' declarants by disputing the identity of the ultimate decisionmaker who rejected the proposed system on behalf of the various telephone companies.

Finally, there must be a satisfactory demonstration of a motivation to enter into an agreement. *First National Bank* v. *Cities Service Co.,* 391 U.S. 253, 287 (1968); *Venzie Corp.* v. *United States Mineral Prod. Co.,* 521 F.2d 1309, 1314-16 (3d Cir. 1975); *Zenith Radio Corp.* v. *Matsushita Elect. Indus. Co.,* 513 F. Supp. 1100, 1172-78 (E.D. Pa. 1981); *see also Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208 (1939) (motivation demonstrated by knowledge that other distributors had been approached with anticompetitive proposal, proposal effective only if adhered to by all distributors, common adherence likely to increase profits for each distributor). Plaintiff presented no evidence of any motivation defendants may have had to enter into an agreement to reject plaintiff's request for a novel and unique combination of telephone company services.

Absent direct evidence raising a factual issue of conspiracy and absent the elements necessary for the inference of a conscious parallelism theory of conspiracy, the record before the Court reveals that defendants are entitled to judgment as a matter of law on plaintiff's claims for violation of section 1 of the Sherman Act, and for violation of Section 2 of the Sherman Act by reason of a conspiracy to monopolize trade.

Monopolization and Attempted Monopolization

In order for plaintiff to succeed on its claim for violation of section 2 of the Sherman Act by reason of monopolization plaintiff must prove two elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). A claim for violation of section 2 of the Sherman Act by reason of attempted monopolization requires three elements: (1) specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success. *Twin City Sportservice* v. *Charles O. Finley & Co.*, 676 F.2d 1291, 1308 (9th Cir. 1982).

Plaintiff has failed to define and to prove the relevant market, a "necessary predicate" for evaluating a monopolization claim. *See United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 618 (1974); *Fount-Wip, Inc.* v. *Reddi-Wip, Inc.*, 568 F.2d 1296, 1301 (9th Cir. 1978). Even assuming that the relevant market is that which plaintiff seeks to enter, the market for credit verification services throughout the United States, plaintiff has failed to counter defendants' declarations to the effect that defendants do not possess monopoly power in this market, lacked intent to hinder competition in this market, and have done nothing toward acquiring or maintaining monopoly power in this market.

Absent any evidence presented by plaintiff raising a factual issue of monopolization or attempted monopolization the record before the Court reveals that defendants are entitled to judgment as a matter of law on plaintiff's claims for violation of section 2 of the Sherman Act.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment is granted.

IT IS SO ORDERED.

DATED: June 14, 1983.

EUGENE F. LYNCH

A-5

ORIGINAL
FILED
SEPTEMBER 8, 1983
WILLIAM L. WHITTAKER
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

HOLOCARD, a California general partnership,

Plaintiff,

vs.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, PACIFIC TELEPHONE & TELEGRAPH COMPANY, WESTERN ELECTRIC CO., INC., GENERAL TELEPHONE & ELECTRONICS CORPORATION, and GENERAL TELEPHONE COMPANY OF CALIFORNIA,

Defendants.

No. C-79-0182 EFL

ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND OR, ALTERNATIVELY TO BE RELIEVED FROM THE SUMMARY JUDGMENT FOR DEFENDANTS

The motions of plaintiff HOLOCARD to alter or amend, or in the alternative, to be relieved from the summary judgment

granted in favor of defendants AMERICAN TELEPHONE AND TELEGRAPH COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INCORPORATED, GENERAL TELEPHONE AND ELECTRONICS CORPORATION, and GENERAL TELEPHONE COMPANY OF CALIFORNIA came on regularly for hearing on September 2, 1983.

Good cause appearing therefore, the Court hereby orders that plaintiff's motions are denied.

Dated: September 8, 1983.

EUGENE F. LYNCH

Judge of the United States
District Court

ORDER DENYING PLAINTIFF'S MOTIONS TO ALTER OR AMEND OR TO BE RELIEVED FROM SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE: THE HONORABLE EUGENE F. LYNCH, Judge

HOLOCARD, *Plaintiff,* vs. AMERICAN TELEPHONE AND TELEGRAPH, *Defendant.*	No. C-79-0182-EFL

REPORTER'S TRANSCRIPT

FRIDAY, JUNE 3, 1983

APPEARANCES:

For the *Plaintiff:*	FRANK E. SIEGLITZ, ESQUIRE PATRICIA MC CALL, ESQUIRE PILLSBURY, MADISON & SUTRO 225 Bush Street San Francisco, California 94104
For the *Defendant:*	Gary J. Near, Esquire Near and Associates 120 Green Street, Third Floor San Francisco, California 94111
Court Reporter:	BARBARA H. STOCKFORD, C.S.R.

FRIDAY, JUNE 3, 1983

THE COURT: Holocard versus American Telephone and Telegraph.

THE CLERK: Civil Case 79-0182.

MR. SIEGLITZ: Good Morning. Frank Sieglitz together with Pat McCall for the defendants named as AT&T, Pacific Telephone and Western Electric.

MR. NEAR: Gary Near on behalf of the plaintiff, your honor.

THE COURT: I don't see any evidence of any conspiracy and I appreciate what you are trying to do is get around that by the theory of conscious parallelism. But if it's based on good business judgment, then there is no basis for the application of that doctrine.

MR. NEAR: Well, I appreciate the Court's concern on the question of conspiracy, Your Honor, but I think in essence, that is a factual question. And I think the standards framed by Mr. Sieglitz and Ms. McCall about what the standards are to establish the antitrust violations are correct. It's based on various declarations—

THE COURT: Not if there is no fact to go to the jury for which they could go either way.

MR. NEAR: You talked about the conspiracy among GTE and American—

THE COURT: There is no evidence of any conspiracy in your affidavits.

MR. NEAR: I think that our affidavits—the document we incorporate—our position is there is evidence of the conspiracy, the conscious parallelism, the joint ventures of the conduct of the defendants, the conscious pattern of receptivity to their proposals and the conscious pattern of rejection of their proposals, communications between them.

And that, we submit, raises a factual question, Your Honor.

MR. SEIGLITZ: Your Honor, we sharply disagree. The law is exactly to the contrary. I am sure the court is familiar with the number of propositions stated in our papers. Probably the thing most pertinent on this point is the WORKMAN case, which I think has been cited by all defendants, which expressly says several cases stand for the proposition that parallel conduct

alone will not support an inference of concerted action; only where the pattern of action undertaken is not consistent with the self-interest of the individual actors.

Not only is there no evidence of conspiracy, the defendants themselves have all come forward with evidence of the fact that these decisions that they made were consistent with their own enlightened self-interest.

THE COURT: I see absolutely nothing in your affidavits about any conspiracy at all. Your affidavits primarily are a series of opinions and conclusions and allegations rather than factual by your client.

MR. NEAR: Well, our declarations or affidavits, Your Honor, are as stated. We will rest on those.

I would indicate they are in response to the particular representations contained in the defendant's declarations in responding to records, Your Honor.

THE COURT: Submitted?

MR. SIEGLITZ: Yes, Your Honor.

THE COURT: I will grant the motion for summary judgment. An opinion will follow.

MR. SIEGLITZ: Thank you, Your Honor.

MR. NEAR: Thank you, Your Honor.

* * *

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

HOLOCARD, a California general partnership,

Plaintiff,

vs.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, WESTERN ELECTRIC CO., INC., GENERAL TELEPHONE & ELECTRONICS CORPORATION, GENERAL TELEPHONE COMPANY OF CALIFORNIA, SECURITY PACIFIC NATIONAL BANK and WELLS FARGO BANK,

Defendants.

U.S. COURT OF APPEALS
DOCKET #83-2467
450 Golden Gate Avenue
San Francisco, CA
September 2, 1983
10:00 O'Clock A.M.
HEARING ON MOTION FOR RECONSIDERATION OF PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT OR TO BE RELIEVED THEREFROM

REPORTER'S TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE EUGENE F. LYNCH, JUDGE

TRANSCRIPT ORDERED BY: WILLIAM J. HOOY, ESQ.

APPEARANCES:

For the *Plaintiffs:* Law Offices of WILLIAM J. HOOY
By: WILLIAM J. HOOY
3135 Clayton Road
Concord, CA 94519

For the *Defendants:*	PILLSBURY, MADISON & SUTRO By: FRANK E. SIEGLITZ PATRICIA H. MCCALL
AMERICAN TELEPHONE & TELEGRAPH COMPANY; PACIFIC TELEPHONE & TELEGRAPH COMPANY; WESTERN ELECTRIC CO., INC.	225 Bush Street P.O. Box 7880 San Francisco, CA 94120
For the *Defendants:*	HELLER, EHRMAN, WHITE & MCAULIFFE M. LAURANCE POPOFSKY, ESQ. JUDITH Z. GOLD, ESQ. REGINA A. STAGG, ESQ. 44 Montgomery Street San Francisco, CA 94104
GENERAL TELEPHONE & ELECTRONICS CORPORATION; GENERAL TELEPHONE COMPANY OF CALIFORNIA	
Court Reporter	DAVE DAVENPORT C.S.R. #1694

Also Present:

Ian S. Keye, Courtroom Deputy

* * *

THE COURT: Holocard versus American Telephone & Telegraph.

THE COURTROOM DEPUTY: The Civil Case #79-0182.

MR. HOOY: Good morning, Your Honor. William Hooy appearing for plaintiff and moving party.

MR. SIEGLITZ: Good morning, Your Honor. Frank Sieglitz together with Pat McCall appearing for the defendants AT&T and Pacific Telephone and Western Electric.

MR. POPOFSKY: Good morning, Your Honor. Larry Popofsky with Judith Gold and Regina Stagg for General Telephone.

THE COURT: Anything else that anybody wants to say that hasn't been said in the papers?

MR. HOOY: I don't think so, Your Honor.

MR. SIEGLITZ: Just this, Your Honor. I am concerned there may have been some obscuring of dispositive issues by plaintiff's purported reply papers. If the Court has any doubt that it is appropriate to deny these motions—

THE COURT: I think it should be stricken. I don't think you should be putting affidavits in reply papers, frankly.

MR. HOOY: Your Honor, I simply did not have that material available to me, and I will represent that to the Court. For example, the Pacific advice letter is dated August 6 which—August 6 I believe it is—which is long after the initial papers were served in this matter.

THE COURT: This case has been pending for over four years. I plan to deny the motion. I think it's way too late.

MR. SIEGLITZ: Thank you, Your Honor.

MR. HOOY: Thank you, Your Honor.

(Whereupon the hearing was concluded.)

* * *

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HOLOCARD, a California general partnership,

Plaintiff-Appellant,

vs.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, WESTERN ELECTRIC CO., INC., GENERAL TELEPHONE & ELECTRONICS CORPORATION, GENERAL TELEPHONE COMPANY OF CALIFORNIA, SECURITY PACIFIC NATIONAL BANK and WELLS FARGO BANK,

Defendants-Appellees.

No. 83-2467
D.C. No.
C-79-0182-EFL
MEMORANDUM

Argued and Submitted—October 2, 1984

Decided—December 20, 1984

Appeal from the United States District Court
for the Northern District of California
Eugene F. Lynch, District Judge, Presiding

Before: WALLACE, KENNEDY, and FLETCHER, Circuit Judges.

Holocard appeals from the district court's grant of summary judgment for American Telephone & Telegraph Company, et al. (the telephone companies). Holocard alleges that the telephone companies violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, by conspiring to restrain interstate commerce in the sale and use of automated credit

verification systems, and attempting to monopolize interstate commerce in the sale and use of such systems. Holocard asserts that the telephone companies accomplished the antitrust violations by (1) agreeing to deny Holocard access to telephone services that were necessary for implementing its proposal; and (2) conspiring and acting to defeat Holocard's complaint filed with the California Public Utilities Commission requesting that the required services be provided by the telephone companies. We affirm.

On June 14, 1983, the district court entered summary judgment in favor of the telephone companies. Within ten days, Holocard filed a motion for reconsideration under Fed. R. Civ. P. §§ 59(e) and 60(b). On September 8, 1983, the court denied the rule 59/60 motion. Holocard filed a notice of appeal from the September 8, 1983 order on September 30, 1983. It failed, however, to specifically appeal from the original summary judgment.

The telephone companies argue that, because the notice of appeal only referred to the denial of Holocard's rule 59/60 motion, the underlying summary judgment may not be reviewed by us. That assumption is incorrect. Although the notice of appeal is technically defective, the error is not fatal if it reasonably can be inferred that Holocard intended to appeal from the summary judgment and if it appears that the telephone companies were not misled. *Ginsberg* v. *Ginsberg,* 276 F.2d 94, 96 (9th Cir. 1960), *cert. denied,* 364 U.S. 934 (1961).

There is no indication in the record that the telephone companies were misled by the defective notice. Moreover, because Holocard's primary objective in filing the 59/60 motion was to have the summary judgment reversed, we may reasonably infer that Holocard intended to appeal from the summary judgment. We may, therefore, review the summary judgment. In doing so, we view the evidence in a light most favorable to the party against whom summary judgment was granted, and must determine whether there was any genuine issue of material fact and whether the moving party was entitled to prevail as a matter of law. *Compton* v. *Ide,* 732 F.2d 1429, 1434 (9th Cir. 1984).

In this case, the telephone companies set forth legitimate business reasons for their decision to reject the Holocard proposal by asserting that its implementation would have necessitated special services that were not available to other customers. The burden then shifted to Holocard to provide specific facts supporting its charge that the decision of the telephone companies was based on an anti-competitive motive. Holocard has failed to make that showing.

We recognize that summary judgments should be granted sparingly in antitrust litigation. *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464, 473 (1962). Nevertheless, summary judgment is proper once the allegations in the complaint are rebutted by probative evidence supporting an alternative interpretation of the defendant's conduct and if the plaintiff then fails to come forward with specific factual support for its allegations. *ALW, Inc.* v. *United Air Lines, Inc.,* 510 F.2d 52, 55 (9th Cir. 1975). In this case, Holocard has failed to put forth any evidence beyond its conclusory allegation that the telephone companies engaged in activities that are barred by the Sherman Act. We, therefore, find that summary judgment was proper.

Motions to reconsider are addressed to the sound discretion of the trial court and are granted only in exceptional circumstances. *United States* v. *Sparks,* 685 F.2d 1128, 1130 (9th Cir. 1982); *Stephenson* v. *Calpine Conifers II, Ltd.,* 652 F.2d 808, 817 (9th Cir. 1981); *Rodriguez* v. *Southern Pacific Transportation Co.,* 587 F.2d 980, 981 (9th Cir. 1978). The circumstances of this case are not of the extraordinary nature that would warrant setting the summary judgment aside. We conclude that the district court did not abuse its discretion in denying the rule 59/60 motion.

AFFIRMED.*

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* The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter,* and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

A/O.USC 1-7-85—T1847—600

Federal Rules of Civil Procedures

Rule 56. Summary Judgment.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Federal Rules of Civil Procedure

Rule 59. New Trials; Amendment of Judgments.

(e) MOTION TO ALTER OR AMEND A JUDGMENT. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Federal Rules of Civil Procedure

Rule 60. Relief From Judgment or Order.

(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

SHERMAN ACT

SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. [July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209; August 17, 1937, Chap. 690, Title VIII, 50 Stat. 693; July 7, 1955, Chap. 281, 69 Stat. 282; December 21, 1974, Public Law 93-528, Sec. 3, 88 Stat. 1708; December 12, 1975, Public Law 94-145 (Anti-trust Procedures and Penalties Act), 89 Stat. 801; 15 U.S. Code, Sec. 1.]

SECTION 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. [July 2, 1890, Chap. 647, Sec. 2, 26 Stat. 209; July 7, 1955, Chap. 281, 69 Stat. 282; December 21, 1974, Public Law 93-528 (Antitrust Procedures and Penalties Act), Sec. 3, 88 Stat. 1708; 15 U.S. Code, Sec. 2.]

28 § 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

NINTH CIRCUIT LOCAL RULES

220-2. Notice and Supporting Papers.

Except as otherwise ordered or permitted by a judge, all motions, except those made in the course of a trial or hearing, shall be noticed in writing on the motion calendar of the assigned judge for hearing not less than 28 days after service. The noticed hearing date and time shall appear on the cover page of each motion, and of any opposition and reply, in the space opposite the caption below the file number. A public record of the date and time of each judge's motion calendar shall be maintained by the clerk and shall be published in an official newspaper of the court. Each notice of motion shall be accompanied by affidavits or declarations under penalty of perjury sufficient to support any material factual contentions, by an appropriate memorandum or brief and by a copy of a proposed form of order. Affidavits, declarations, and forms of orders shall not be physically attached to the notice or brief or memorandum and shall be separately captioned. Counsel shall have available at the hearing the original of any proposed form of order for signature by the judge.

220-3. Opposition and Reply.

Any opposition to the motion shall be served and filed not less than fourteen days preceding the noticed (or continued) date of hearing, and shall consist of affidavits or declarations where appropriate, a memorandum or brief, and a copy of a proposed form of order, separately captioned and not physically attached. A party not opposing a motion shall instead file a statement of no opposition within the time provided above.

Any reply to the opposition shall be served and filed by the moving party not less than seven days preceding the noticed (or continued) date of hearing.

235-3. Status or Scheduling Conference.

At any time after an action or proceeding has been filed, the assigned judge may, with or without the written request of any party, order the holding of a status or scheduling conference. All parties receiving notice of the conference shall attend in person or by counsel and shall be prepared to discuss such subjects as may be specified in the order noticing the conference and, in addition, the following:

PROOF OF SERVICE

I am a citizen of the United States and a resident of the City and County of San Francisco; I am over the age of eighteen years and not a party to the within action; my business address is: 645 Harrison St., San Francisco, CA.

On 19 I served the within

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

on the attorneys in said action by placing copies thereof enclosed in a sealed envelope with postage fully prepaid in the United States post office box at San Francisco, California addressed as follows:

Pillsbury, Madison & Sutro
Frank E. Sieglitz
Randolf J. Rice
Patricia H. McCall
225 Bush Street
Mailing Address: P.O. Box 7880
San Francisco, California 94120

M. Laurence Popofsky, Esq.
Judith Z. Gold, Esq.
Heller, Ehrman, White & McAuliffe
44 Montgomery Street
San Francisco, CA 94104

I certify under penalty of perjury that the foregoing is true and correct.

Executed on 19 at San Francisco, CA.

By_____